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IN THE

Supreme Court of the United States

October Term, 1982

LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether, absent proof that protected concerted activities were a motivating factor in an employer's discharge of its employees, the union can, nevertheless, be found to have caused their discharge.

2. Does the doctrine of respondeat superior impose liability on a union for the conduct of its shop steward while performing duties for which he was totally responsible to his employer.

3. Does due process prevent the finding of an unfair labor practice without a hearing on the merits as required by the Administrative Procedure Act and the National Labor Relations Board's Rules and Regulations.

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LOCAL 282, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Local 282, I.B.T., prays that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Second Circuit enforcing an order of the National Labor Relations Board.

ORDERS BELOW

The order of the Court of Appeals

(App. A at 1a)[1] has not been reported. The findings of fact, conclusions of law and order of the National Labor Relations Board (App. A at 204-237) are reported at 251 NLRB 219 (1980).

JURISDICTION

The order of the United States Court of Appeals for the Second Circuit, enforcing the Board's order was entered on April 14, 1982. This petition was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) and Section 10(f) of the National Labor Relations Act, as amended.

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[1] "App. A" and "App. B" refer to the appendices to this petition for certiorari. Appendix A contains the order of the Court below, the decision and order of the National Labor Relations Board and the Administrative Law Judge, the Order consolidating Cases, Complaint and Notice of Hearing (dated December 30, 1977), and Complaint and Notice of Hearing (dated April 19, 1978). Appendix B contains the statutory and regulation references.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, are Sections 8(b)(1)(A) and 8(b)(2). They are set forth in Appendix B.

STATEMENT OF THE CASE

Willets Point Contracting Corp. ("Willets") is engaged in the asphalt supply and paving business in New York City, New York. The Willets' truck drivers, as well as those employed by others engaged in the asphalt and paving industry within the City of New York, were covered by the terms and conditions set forth in the 1975-1978 Ready-Mix, Sand, Gravel, Asphalt and Bulk Cement Contract ("Agreement") [A. 1477-1479],[2]

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2 "A." refers to the Appendix in the Court of Appeals.

negotiated by the General Contractors Association ("GCA") and Local 282, I.B.T. ("Union").

The historical method for assigning Willets' drivers to available work is by seniority among those persons that report timely. This is the industry's "shape system". Drivers are required to shape daily in order to preserve their seniority.

Because of a reduction in employment opportunity all of the Willets' drivers, in September 1974, agreed, among themselves, to alter the shape system at Willets to one day per week. No official of the Union, the GCA or Willets participated in this arrangement (A. 1071).

On October 21, 1977, Willets addressed termination letters to five (5) drivers, including Charles Curd and John Kuebler. The letters pointed out that the five (5) drivers were not

shaping daily to make themselves available for work [App. A at 275]. Kuebler and Curd filed unfair labor practice charges against Willets alleging a violation of Section 8(a)(3). They, thereafter, also filed Section 8(b)(1)(A) and (2) charges against the Union. The charges against Willets were dismissed by the Board's Regional Director and a complaint was issued against the Union. Each charge filed by Kuebler and Curd alleged that the discharge was because of engaging in concerted protected activity.

The Board's Conclusions of Law and Order

The Board, adopting the conclusions of law of the Administrative Law Judge ("ALJ"), found that the Union violated Sections 8(b)(1)(A) and 8(b)(2) by causing Willets to discharge Kuebler and Curd. The Board further accepted the ALJ's findings that Willets delegated to Robert Worhacz, the drivers' shop steward, "total responsibility for the

maintenance of [its] shape records" and that Worhacz utilized that authority to devise and implement a discriminatory scheme to cause the discharge of Kuebler and Curd through the falsification of those records [App. A at 69, 107-108].[3] The Board's order directs the Union to compensate Kuebler and Curd for all days they would have worked for Willets between October 21, 1977 and the date of their reinstatement or until such time as they have found substantially equivalent positions elsewhere if Willets refuses to reinstate them [App. A. at 232-233].

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[3] The Board found that Kuebler and Curd had shaped one day each week and that Worhacz had not reflected this in the Willets' shape records. The stated cause for their discharge was that they didn't shape the job, daily, to make themselves available for work. It is speculative to infer that Willets' decision would have been different had its shape records supported Kuebler and Curd's claim that they shaped the job one day each week.

The Decision of the Court of Appeals

The Court of Appeals acting upon the petition of the Board, pursuant to Section 10(f) of the Act, granted enforcement of the Board's order by an informal opinion [App. A at 1a]. The court found "the record sufficient to support the Board's finding that Worhacz was acting as the agent of the Union." The court further observed that it need not determine whether the Board's Wright Line[4] test for determining causation for these discharges was applicable because the "Union's essential position was denial of a wrongful motivation, not that a wrongful motivation played only a minor part in an otherwise justified action."

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4 NLRB v. Wright Line, 662 F. 2d 899 (1st Cir. 1981), cert. denied __U.S. ___ 1982).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE PRINCIPLES ENUNCIATED BY THIS COURT IN MT. HEALTHY CITY SCHOOL BOARD OF EDUCATION V. DOYLE

The General Counsel has not satisifed its burden of proof to show that Willets' discharge of Kuebler and Curd was caused or was attempted to be caused by the Union. NLRB v. Eldorado Mfg. Corp. 660 F. 2d 1207 [7th Cir. 1981].

A violation of Section 8(b)(2) can be found without joining the employer as a co-respondent and finding a Section 8(a)(3) violation. Radio Officers v. NLRB, 347 U.S. 17 (1954). The essential feature of a Section 8(b)(2) violation is the relationship between cause and effect. There must be an affirmative showing of collusion between the labor organization and the employer to cause or attempt to cause the unlawful discharge.

Here, however, charges were filed by Kuebler and Curd against Willets and dismissed on the very day that the complaint was issued against the Union. Under the circumstances herein the failure to join Willets as a co-respondent constituted a breach of discretion when considered in conjunction with the Board's finding, without any allegation in the complaint, that the Union caused Kuebler and Curd's discharge. [App. A at 250-274].

The intent of this Court and Congress has been to give the Board power to both find and remedy unfair labor practices based upon comparable standards for both employers and unions. The record proof, herein, would have resulted in the dismissal of a Section 8(a)(3) complaint against Willets under the Board's Wright Line adaptation of this

Court's Mt. Healthy test.[5] The Wright Line test requires the General Counsel to show that protected activities were a "motivating factor" in the decision to terminate an employee, and to prove the Section 8(a) (3) violation by a preponderance of the evidence.

There is no record evidence that protected activities of Kuebler and Curd were a "motivating factor" in Willets' decision to terminate them. Had the General Counsel carried that burden the ALJ and the Board could then have gone on to determine whether the General Counsel had shown by a preponderance of the evidence that Willets would not have terminated Kuebler and Curd "but for" the falsification of their shape

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5 Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

records. This Court's Mt. Healthy test is not satisfied by an inference that Willets was erroneously led to believe that Kuebler and Curd did not observe their obligation under the shape system.

The decision below required the Union to request the reinstatement of Kuebler and Curd by Willets; to suffer the back pay consequences of Willets' discharges of Kuebler and Curd and Willets refusal to reinstate them.[6] The Board issued this remedial order without any record evidence of whether Willets: (1) was motivated to terminate Kuebler and Curd because of their protected activities, and (2) would have reached the same termination decision had the falsification of Kuebler and Curd's shape records not occurred.

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[6] Willets has refused the Union's request to reinstate Kuebler and Curd.

The Mt. Healthy test is a rule of causation which focuses upon placing a terminated employee in no better position by engaging in protected activity than that person would have otherwise occupied. The decision below would have the Union bear the burden of proving a negative, to wit., that Willets' discharges were not caused by any falsification of the shape records, without General Counsel coming forward with any proof that protected activities were a "motivating factor" in Willets' decision to terminate Kuebler and Curd. Such a burden on the Union is practically impossible and legally obnoxious. In so doing the Board has done violence to the principles enunciated by this Court in its Mt. Healthy decision.

The issue presented herein was confronted and decided by the Seventh Circuit in NLRB v. Eldorado Mfg., Corp.,

supra. That court applied the Mt. Healthy test and found that "even assuming that the union requested the discharges there was no violation of Sections 8(b)(2) and (1)(A)."

2. THE DECISION BELOW RESTS ON AN ERRONEOUS LEGAL FOUNDATION AND MUST BE SET ASIDE.

The Board's Decision and Order found that Willets, alone, delegated to Worchaz "total responsibility for the maintenance of [its] shape records." Worchaz was to have utilized that authority to devise and implement a discriminatory scheme to discharge Kuebler and Curd. The unfair labor practices attributed to the Union are pursuant to the common-law doctrine of respondeat superior that Congress has applied to labor organizations. To hold a union responsible for the acts of a shop steward it must be clearly shown that the steward was acting pursuant to a

settled union policy. Coronado Coal Co. v. Mine Workers, 268 U.S. 295, 304 [1925]. Moreover, there must be substantial evidence that the Union instigated, supported, ratified or encouraged the activity in question. Carbon Fuel Co. v. Mine Workers, 444 U.S. 212, 217 (1979).

Sections 8(a)(1), 8(a)(2), 8(a)(3), 8(b)(1) and 8(b)(2) form a web, of which 8(b)(1)(A) is only a strand. It prevents a union from inducing an employer to use the emoluments of the job to enforce the union's rules. Scofield v. NLRB, 394 U.S. 423, 428-429; NLRB v. Allis Chalmers Mfg., Co., 388 U.S. 175, 184-185.

Here, the imputation of liability upon the Union is fundamentally inconsistent with the statute. There is no room under the Act for imposing liability on the "premise" that a functioning union must be held responsible for conduct

of its stewards. It is a matter of proof whether in a particular event a person chosen, and acting within the scope of his authority, has engaged in illegal acts subjecting the union, as an entity to liability. The illegal conduct attributed to Worchaz in this case is not the action of the Union's "[agent] in accordance with [its] fundamental agreement of association" and is not a basis for liability of the organization, which, as an institution, has a separate existence from those who are its members, at any given time. Coronado Coal Co., supra, 268 U.S. at 304.

There is no evidence attributing Worhacz' action to the Union. The preparation and maintenance of Willets' shape records was undertaken, solely, in his employer's behalf. This case is distinguishable from one involving the attribution of a steward's conduct to

the union, since the Board, here, associates Worhacz's conduct to an inference of unlawful conduct between Willets and the Union. To look at Worhacz's conduct to determine a reason for Willets' termination of Kuebler and Curd is inappropriate since there is no proof that Worhacz's motivation was attributable to either Willets or the Union as a whole.

The Board found Worhacz to be totally responsible for the maintenance of Willets shape records. Worhaz was acting on behalf of Willets and subject to its control. To hold the Union vicariously liable for this conduct there must be a record basis for believing that it had the right to control Worhacz in these activities. Such power is not inferable from his shop steward relationship to the Union. The record contains no findings regarding the con-

duct of the Union to support the application of respondeat superior to the cause for discharging Kuebler and Curd. General Building Contractors Association Inc. v. Pennsylvania, et al., ___ U.S. ___, decided June 29, 1982.

The Court below relies upon its decision in NLRB v. Local 3, I.B.E.W., 467 F. 2d 1158 (2d Cir. 1972). In that case the court below attributed implied or apparent authority to the conduct of three (3) union members, including a shop steward, in finding that the union violated the secondary boycott provisions of the Act.

In that case the Board found that the Union had a policy which obligated its members to protect the union's work jurisdiction under the threat of penalty. The Second Circuit found:

> "Even if the agent in carrying out the union's policy used means proscribed by the principal, it would not necessarily excuse the union from responsibility. Sheet Metal Workers v. NLRB, 293 F. 2d 141, 149 (D.C. Cir. 1961), cert. denied, 368 U.S. 896 (1961). Protection of union work claims clearly is a policy of Local 3." 467 F. 2d at 1160.

Here, the Board didn't attribute any policy or unlawful motivation on the part of the Union in an effort to associate Worhacz's conduct to an inference of unlawful activity by the Union and Willets. Clearly, any unlawful acts of Worhacz were the acts of an individual, for which there can be no imposition of vicarious liability.

3. THE UNION DIDN'T RECEIVE THE DUE PROCESS REQUIRED BY THE ADMINISTRAIVE PROCEDURE ACT AND THE BOARD'S RULES AND REGULATIONS.

The General Counsel's complaint does not allege that the Union caused the discharges of Kuebler and Curd by Willets. Yet, the Board has concluded

this and the court below has granted enforcement of the Board's order.

General Counsel didn't refer to an allegation of unlawful cause for these discharges in its opening statement; no evidence was introduced that the Union caused their discharges or that Willets was motivated to discharge Kuebler and Curd because of their protected concerted activity, and General Counsel didn't seek to amend the complaint or to brief this subject. Nor, on the record evidence can the Union be held to have consented to a trial of this issue. Thus, the Union did not receive the due process required by Section 554 of the Administrative Procedure Act, 5 U.S.C. Section 554, and Section 102.15 of the Board's Rules and Regulations, 29 C.F.R. Section 102.15. As this Court stated in SEC v. Chenery Corp., 318 U.S. 157, 182

(1971), "an order may not stand if the agency has misconceived the law."

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

July 14, 1982

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